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In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL RECTIFIER CORPORATION,

Petitioner,

v.

PETER R. COHEN, individually, and DEBORAH D. RIORDAN, as the Administratrix of the Estate of Edward Joseph Riordan, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, contrary to the law of other circuits, Article III of the Constitution of the United States permits a federal district court in Minnesota to exercise subject matter jurisdiction over an attorney-client fee contract dispute governed by state law between non-diverse, California parties merely because the fee contract relates to a federal antitrust action that was settled and dismissed with prejudice by the district court in 1975, six years before the commencement of the contract action below.

2. Whether the court of appeals improperly abdicated its well-established duty to decide the subject matter jurisdiction issue, even though the jurisdictional record had been fully developed in the district court, which upheld jurisdiction in a lengthy opinion, the jurisdictional issue was fully briefed and argued in the court of appeals and the case was properly on appeal under 28 U.S.C. § 1292 (a)(1).

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OPINIONS BELOW

The judgment order of the Eighth Circuit (Judge Ross dissenting) and its order denying a petition for rehearing and suggestion for rehearing en banc by a 5-3 vote, neither of which are officially reported, are reprinted in the appendix hereto as Appendix A and Appendix B. The opinion of the United States District Court for the District of Minnesota (Chief Judge Miles W. Lord presiding) is published at 520 F.Supp. 635, and is reprinted in the appendix hereto as Appendix C.

JURISDICTION

The judgment order of the court of appeals was entered on April 5, 1982, and the petition for rehearing was denied on July 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . [or] to controversies . . . between citizens of different states . . . .

STATEMENT OF THE CASE

The Prior Antibiotic Antitrust Action and the Doxycycline Case

In 1969, International Rectifier Corporation (Rectifier), a California corporation, retained the California law firm of Rosenfeld, Meyer & Susman (the Rosenfeld firm), of which respondents, Peter R. Cohen and Edward J. Riordan* (Cohen and Riordan), then were members, to represent Rectifier in an antitrust action against several drug companies, including Pfizer, Inc. The Rosenfeld firm had a written, one-third contingent fee agreement with Rectifier. C.A. App. 3-4, 20.** On December 2, 1970, Recti-

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* Cohen and Riordan are two California attorneys, the latter of whom is deceased and is represented herein by his administratrix.

** "C.A. App." refers to the Appendix of Appellant dated July 14, 1981 that was filed with the Eighth Circuit. "App." refers to the appendix hereto.

fier's antitrust action, and numerous other antibiotic antitrust actions, were transferred by order of the Multidistrict Panel to District Judge Miles W. Lord, then designated to the Southern District of New York, who subsequently transferred all of the non-settling actions to the District of Minnesota. App. 4.

In 1973, Pfizer filed a patent infringement action against Rectifier (the doxycycline case) in the Central District of California, which was also transferred to the District of Minnesota for coordinated pretrial proceedings with the antitrust action. *Pfizer, Inc.* v. *International Rectifier Corp.*, 538 F.2d 180, 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

The Departure of Cohen and Riordan from the Rosenfeld Firm

In 1974, Cohen and Riordan had a dispute with the Rosenfeld firm and left that firm to form their own California law partnership. C.A. App. 4-5. In May 1974, Rectifier discharged the Rosenfeld firm and retained Cohen and Riordan pursuant to a written contract, the interpretation of which is the subject of this action. In October 1975, the Rosenfeld firm sued Rectifier in California state court to recover fees. C.A. App. 5, 7, 24, 30.

Cohen and Riordan's written contract with Rectifier was for a fixed, non-contingent fee plus a contingent "bonus" that was based on 8¾% of "the net amount recovered" by Rectifier. Of particular importance here, the computation of Cohen and Riordan's bonus was expressly subject to two reductions: (1) any amount recovered from Rectifier by Pfizer in the doxycycline case was to be subtracted from any recovery by Rectifier in the antitrust case in calculating the amount of the bonus; (2) Cohen and Riordan's bonus was to be reduced by the

amount, if any, by which their fee plus any fee recovered from Rectifier by the discharged Rosenfeld firm exceeded one-third of Rectifier's recovery in the antitrust action. C.A. App. 24-29.

The Settlement of the Antitrust Action and Establishment of the Fee Escrow

On November 11, 1974, Rectifier's antitrust action commenced trial before Judge Lord. It was settled for $33 million on August 14, 1975. C.A. App. 6. On that day, Judge Lord entered an order dismissing the case "with prejudice and without costs or attorneys' fees." C.A. App. 155. He did not retain jurisdiction in any respect, let alone with respect to attorneys' fees.

Cohen and Riordan were paid outright their substantial fixed fee. Their contingent bonus was calculated to be $2,450,018. C.A. App. 8. On September 15, 1975, the parties agreed to place the bonus into escrow with a California bank, expressly pending "final determination of certain related matters referred to in the [fee] Agreement." C.A. App. 51. In the interim, Cohen and Riordan were to receive, and have received to date, the substantial interest income on the escrowed funds. C.A. App. 169.

To date, neither of these "related matters" has been finally determined. In the doxycycline case, in June 1980, the United States District Court for the Central District of California upheld Pfizer's doxycycline patent.* Only damages remain to be tried. App. 22-23. As stated, any damages awarded Pfizer must be deducted from the $33 million settlement in finally computing Cohen and Riordan's bonus. Nor has the attorneys' fee action filed in

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* The doxycycline case was retransferred to the Central District of California for trial.

the California state court in October 1975 by the Rosenfeld firm against Rectifier yet been finally resolved.**

Proceedings Below

Nonetheless, on May 28, 1981, Cohen and Riordan, claiming that all of the escrow contingencies had been resolved, filed a petition in the district court below for release of the escrowed funds. C.A. App. 1-62. On June 22, 1981, over Rectifier's objection that subject matter jurisdiction was lacking, the district court issued a preliminary injunction that ordered, *inter alia*, the $2.45 million in escrowed funds transferred from the California bank to a Minneapolis bank. C.A. App. 180-82. Rectifier appealed pursuant to 28 U.S.C. § 1292(a)(1).

On April 5, 1982, a three-judge panel of the Eighth Circuit, Judge Ross dissenting, affirmed the preliminary injunction "without prejudice" to Rectifier's right to raise the jurisdiction question "after the district court has decided the case on the merits." App. 1. On July 7, 1982, the Eighth Circuit entered an order denying Rectifier's petition for rehearing and suggestion for rehearing en banc, stating that Judges Ross, McMillian and John R. Gibson would grant en banc rehearing. App. 2.

** In July 1980, a jury awarded the Rosenfeld firm approximately $4.4 million to which the trial court added about $1.5 million in prejudgment interest. Rectifier appealed and the Rosenfeld firm cross-appealed for the entire one-third fee. C.A. App. 11, 160-67.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS ON THE QUESTION OF WHETHER A FEDERAL DISTRICT COURT HAS JURISDICTION OVER AN ATTORNEYS' FEE CONTRACT DISPUTE MERELY BECAUSE THE FEE RELATES TO A CASE THAT WAS, AT SOME PRIOR TIME, LITIGATED IN THE DISTRICT COURT.

The Seventh Circuit has held that federal courts do not have jurisdiction over attorneys' fee contract disputes merely because the fee contract relates to a case that was once litigated in the district court. *Bounougias* v. *Peters*, 369 F.2d 247 (7th Cir. 1966), *cert. denied*, 386 U.S. 963 (1967). In *Bounougias*, as here, the attorneys' fee contract dispute was unrelated to the original suit over which the district court had subject matter jurisdiction and did not relate "to matters coming so near to the life and dignity of the district court that an exercise of inherent powers to protect its authority was necessary." The Seventh Circuit observed that all parties had adequate remedies in the state court and vacated a judgment for the attorneys. *Id.* at 249.

The *Bounougias* decision has been followed by the Fourth Circuit in *Taylor* v. *Kelsey*, 666 F.2d 53 (4th Cir. 1981), and by the Middle District of Pennsylvania in *Minersville Coal Co.* v. *Anthracite Export Assn.*, 55 F.R.D. 429 (M.D.Pa. 1972). *See also, Muirhead* v. *Bonar*, 556 F.2d 735 (5th Cir. 1977) (no federal jurisdiction over suit by

attorney discharged from federal Title VII case); *Andrews* v. *Central Surety Insurance Co.*, 295 F.Supp. 1223, 1228 (D.S.C. 1969) (jurisdiction over attorneys' fee contract disputes "would not extend to a situation where the main suit had been fully concluded and there were no assets actually or constructively within the court's possession and control as a result of the principal suit," citing *Bounougias*).

On the other hand, in addition to the district court below, the Second Circuit has upheld jurisdiction over an attorneys' fee contract dispute, even though the principal action had concluded. *Grimes* v. *Chrysler Motors Corp.*, 565 F.2d 841 (2d Cir. 1977).

As the numerous other cases cited in the district court's opinion show, the issue of federal jurisdiction over attorneys' fee contract disputes is one of recurring importance. *See*, App. 24-34. *See also*, *Broughten* v. *Voss*, 634 F.2d 880 (5th Cir. 1981). Both conflict and confusion have developed on this issue.

If subject matter jurisdiction over this dispute exists, then the federal courts have jurisdiction over all fee disputes, no matter when they arise, simply because the fee relates in some way to a matter that was once litigated in a federal court.

This Court should grant certiorari because this case presents a question of exceptional importance concerning the scope of federal jurisdiction, the resolution of which has resulted in conflict and confusion among the lower courts.

II.

THE COURT OF APPEALS IMPROPERLY ABDICATED ITS DUTY TO DECIDE THE SUBJECT MATTER JURISDICTION QUESTION.

In *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee,* 102 S.Ct. 2099, 2104 (1982), this Court recently reemphasized that subject matter jurisdiction "is an Article III as well as a statutory requirement." A federal court, including an appellate court, has the duty to deny subject matter jurisdiction, even on its own motion, where "jurisdiction does not affirmatively appear in the record."

Here, the Eighth Circuit has refused to decide the subject matter jurisdiction question even though the jurisdictional record had been fully developed in the district court, which upheld jurisdiction in its lengthy opinion, and the jurisdictional issue was extensively briefed and was argued before the Eighth Circuit in August 1981, about eight months before it promulgated its order refusing to decide Rectifier's appeal. This is a clear abdication of judicial responsibility. *United States* v. *Corrick,* 298 U.S. 435, 440 (1936) (interlocutory injunction reversed with directions to dismiss for want of subject matter jurisdiction; lower court "should . . . have declined *sua sponte* to proceed in the cause.")

The record indisputably demonstrates that: no federal question or court-awarded fee is involved, but rather this case presents a pure contract dispute that is governed by state law; diversity is lacking; and the antitrust action out of which the escrowed fee arose was dismissed "with prejudice and without costs or attorneys' fees" about six years before Cohen and Riordan filed their action below. The jurisdictional record simply cannot be improved by further proceedings.

Clearly, the jurisdictional issue is ripe for decision and should be resolved at this time. Otherwise, an extended jury trial will be required in the district court to no purpose if Rectifier is correct that federal jurisdiction is lacking. The refusal of the court of appeals to determine whether there is federal jurisdiction is thus not only inconsistent with settled law, but also is contrary to the sound administration of justice.

CONCLUSION

This Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits that exists concerning federal court jurisdiction over attorneys' fee contract disputes. In the alternative, this Court should grant the petition, vacate the judgment below and remand this case to the court of appeals with directions for it to decide whether there is federal jurisdiction over this state law contract dispute.

Respectfully submitted,

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